

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Acceleration of	§	WC Docket No. 11-59
Broadband Deployment: Expanding the	§	
Reach and Reducing the Cost of	§	
Broadband Deployment by Improving	§	
Policies Regarding Public Rights of Way		
and Wireless Facilities Siting		

**COMMENTS OF SELECT MINNESOTA MUNICIPALITIES¹
IN RESPONSE TO THE FCC’S BROADBAND AND RIGHTS OF WAY NOI**

These comments are submitted on behalf of the City of Bloomington, Minnesota², the Northern Dakota County Cable Communications Commission (“NDC4”)³ and the Southwest Suburban Cable Commission (“SWSCC”)⁴ in response to the Federal Communications Commission *Notice of Inquiry concerning Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding*

¹ The Minnesota municipalities consist of the City of Bloomington, Minnesota, the Northern Dakota County Cable Communications Commission and the Southwest Suburban Cable Commission, hereinafter collectively referred to as the “Coalition Cities.”

² The City of Bloomington, Minnesota consists of 38.3 square miles, 37,641 housing units, 82,893 residents and 85,000 employees. Bloomington is the third largest city in the Minneapolis-St. Paul-Bloomington Metropolitan Statistical Area. Bloomington’s major industries include retail and entertainment, hotel and restaurant, health maintenance and computer manufacturing.

³ The Northern Dakota County Cable Communications Commission (“NDC4”) is a municipal joint powers cooperative comprised of the cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul with a combined population of approximately 86,000 people or 35,000 households. This diverse group of seven cities ranges in size from 200 to 34,000 population, and includes densely populated first-ring suburbs, riverside villages, high income residential suburbs with larger lots, and rural, undeveloped areas in the process of transforming into industrial parks, residential developments, and business districts.

⁴ The Southwest Suburban Cable Commission (“SWSCC”) is a municipal joint powers cooperative comprised of the cities of Eden Prairie, Edina, Hopkins, Minnetonka and Richfield, Minnesota with a combined population of approximately 220,000. The SWSCC cities have been recognized by *Money* magazine as one of the “Best Places to Live” in America. The cities are home to over 5,000 businesses, including Best Buy, Cargill, Super Valu, and the Minnesota Vikings.

*Public Rights of Way and Wireless Facilities Siting (“NOI”).*⁵ Collectively these comments represent the views of the above referenced thirteen (13) municipalities (“Coalition Cities”).

I. INTRODUCTION

The Coalition Cities recognize that broadband deployment throughout their jurisdictions has lead to economic development, job creation and improved lifestyle for their residents. These cities recognize that broadband is vital to the economic well being of their community and without adequate broadband facilities in place, the community may be unable to meet the demands of its residents and businesses. The Commission’s operating premise in the NOI, that municipalities are standing in the way of broadband deployment and are serving as “barriers to entry,” is unsupported and contradicts the facts in the Coalition Cities.

The Coalition Cities consist of thirteen (13) suburbs of the Twin Cities of Minneapolis and Saint Paul, Minnesota. The combined population of the Coalition Cities is just under 400,000. Many of the thirteen Coalition Cities have sophisticated and complex right-of-way (“ROW”) requirements that are far more detailed and demanding than many rural Minnesota communities. Despite these sophisticated ROW obligations, the industry has fully built out the developed areas of each and every one of the Coalition Cities and there are presently no unserved areas. Rather, the Coalition Cities enjoy broadband competition from multiple providers and remain open to new providers in the marketplace.⁶

The historical ROW policies of the Coalition Cities have in fact resulted in ubiquitous broadband coverage. All thirteen of the Coalition Cities previously required the incumbent cable

⁵ *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 11-51, WC Docket No. 11-59, Notice of Inquiry (April 7, 2011).

⁶The Coalition Cities are served by one franchised cable provider, Comcast, which provides voice, video and broadband services throughout each of the thirteen cities. The Coalition Cities are also served by CenturyLink (as a result of its recent acquisition of Qwest). CenturyLink provides voice and broadband services and partners with satellite providers for the provision of video services. Each of the Coalition Cities is served by four or more wireless providers and numerous CLECs and other backhaul providers.

operator to fully build out each city as a condition of the grant of local cable franchises. These build out requirements, dating back as far as the mid-1980s, ultimately resulted in the construction of communications systems serving virtually every household in each of the cities as development occurred, leaving no unserved pockets, even where low household density may have deterred an operator. Absent the local build out regulations and franchise obligations under which these systems were constructed and upgraded, there is every possibility that portions of these cities would not enjoy the same level of broadband service currently in place.

The Coalition Cities appreciate that municipal ROWs are essential corridors that provide a vital pathway for transportation, communications and economic development in a community. The ROWs accommodate pedestrian and vehicular traffic, shade trees, traffic signals and signs, street lights, water mains, storm and sanitary sewers, gas lines, electric wires, as well as telephone and cable television wires that deliver broadband services. Management of municipal ROWs is therefore a process of balancing multiple demands on the same property. Attempting to create a “one size fits all” set of federal regulatory ROW standards is simply not feasible and would only result in disruption of a ROW process that is working smoothly in the Coalition Cities.

The Coalition Cities are a microcosm of the state of Minnesota and the nation. The Coalition Cities range in size from the 3rd largest city in the Minneapolis-St. Paul metropolitan area, with an International Airport and major Interstate Beltline, to tiny Lilydale and Mendota, founding river villages with unique historical issues, to 3rd ring still-developing Inver Grove Heights, with suburban and rural areas requiring city oversight of installation of water and sewer infrastructure in new developments. The Commission simply cannot draft ROW rules to address

the unique issues faced by the Coalition Cities and certainly the Commission cannot adopt rules that would attempt to regulate cities across the entire nation.

To protect the health and safety of businesses and residents, as well as to protect the existing facilities of local government and other ROW users, municipalities must have the ability and local authority to ensure the efficient use of the ROW. This can best be accomplished through the development of effective “local policies and management practices” and the ability of municipalities to levy fees to recover costs and receive fair and reasonable compensation from ROW occupants for the private for-profit use of these public municipal ROWs.

II. LOCAL RIGHT-OF-WAY PRACTICES ARE NECESSARY TO PROTECT VITAL LOCAL INTERESTS AND DO NOT DISCOURAGE BROADBAND DEPLOYMENT

While deployment of fiber-rich broadband systems is a goal shared by virtually all municipalities in the country, the disruption and financial impact these system installations can have on existing city infrastructure and existing providers can be substantial. In particular, the disruption of ROWs can impose a financial burden that should not be borne by a municipality but rather by the broadband service provider utilizing the ROW. The financial burdens on municipalities include the: 1) initial disruption caused by system construction; 2) reduced value (integrity/life span) of the ROWs following multiple street cuts; 3) difficulty accessing municipal or existing private provider facilities in an already crowded ROW; 4) ongoing maintenance and oversight related to the ROW occupation; and 5) added cost of ROW replacement given the presence of added facilities that must be relocated.

The Coalition Cities support the Commission’s efforts to encourage cooperation among broadband providers and cities to highlight creative and successful approaches to ROW management. The goal should not be to mandate national uniformity but rather to offer examples of what has worked for local ROW management and best practices used by

municipalities nationwide. The Commission should also acknowledge that in most states municipal leagues already provide guidance to cities with sample ordinances and model rules for consideration and adoption. In Minnesota, the League of Minnesota Cities has provided guidance and model ordinances to 800 member cities in Minnesota and on the national level, the National League of Cities serves as a similar resource to thousands of cities across the nation. Rather than attempt to establish rules to impose upon cities with little knowledge of the state and local issues impacted, the Commission should instead consider developing a national repository of ROW policies and procedures used in cities across the nation that could be accessed as examples by both industry and government. The Commission should also convene a joint task force consisting of “state, local and Tribal” authorities to consider and recommend ROW practices. This concept was raised in the National Broadband Plan⁷ but has yet to be implemented.

A. The Coalition Cites Support the Comments of the National Municipal organizations.

The Coalition Cities support and adopt the comments of the National League of Cities, National Association of Telecommunications Officers and Advisors, the American Public Works Association, the Government Finance Officers Association, the National Association of Counties, the U.S. Conference of Mayors, and the International Municipal Lawyers Association filed in response to this NOI.

The Coalition Cities are dues-paying members of the above-mentioned organizations, and as such these national organizations represent our views and interests on the national perspective of cities across the nation. The national organizations’ comments will address questions of national scope within this NOI, including FCC jurisdiction, industry trends and representations,

⁷ See recommendation 6.6 of the National Broadband Plan.

and broadband deployment facts. These national comments will present the consensus positions of municipalities nationwide. We support and adopt their comments on our behalf.

B. Minnesota ROW Regulations provide Cities with Flexibility to Address Unique Local Requirements.

The Coalition Cities generally face two primary types of ROW users: 1) utilities, such as water, gas, electric and telephone; and 2) private users, such as cable television operators or telecommunications providers that do not hold a certificate issued by the Minnesota Public Utilities Commission (MPUC).

Utilities in Minnesota are governed by four sources of legal authority that affect the regulation of public ROWs. First, cities can adopt local ordinances setting forth how the city will manage the ROW. It is optional for a Minnesota city to adopt such a local ROW ordinance. The local ordinance is the controlling document as long as it does not conflict with any of the following three sources.

Second, the MPUC has adopted rules (“MPUC Rules”) implementing the MPUC’s authority to establish statewide standards for managing the public ROW.⁸ If a local ordinance, or a decision made pursuant to that local ordinance, is in conflict with the MPUC Rules, the MPUC Rules will control over the local ordinance.

Third, Minnesota State statutes govern certain actions of cities regarding ROW management. Cities are created by statute and have only those powers expressly granted to them or necessarily implied. Cities must comply with statutory requirements, including those relating to ROW management. Therefore, state statutes control over the local ordinance.⁹

⁸ See generally Minnesota Administrative Rules, Chapter 7819, Public Rights-of-way Standards.

⁹ Most of the statutory provisions in Minnesota related to use of the ROW can be found in Minn. Stat. § § 237.162 and 237.163.

Fourth, cities may enter into a franchise agreement with a ROW user and such agreement will typically contain ROW requirements. If the franchise agreement contains provisions regulating the use of the ROW, those franchise agreement provisions will control over conflicting provisions in the other three sources. The franchise agreement is a contract between the city and the ROW user and state law expressly makes that contract the primary source of regulation of the ROW.¹⁰

While the Minnesota regulatory system governing ROWs sets forth general guidelines for ROW management, cities still retain flexibility to draft local ROW ordinances and enter into franchise agreements with ROW users to address unique local ROW issues as well as issues that may be unique to the provider. This flexibility is crucial to allow cities to respond to the local needs, interests and preferences of local businesses and residents. Most importantly, for purposes of these comments, this long standing ROW regulatory regime utilized by the Coalition Cities has not resulted in any barrier to broadband deployment, nor have these ROW practices in any way deterred broadband providers from investing in these communities.

C. The Coalition Cities have Proactively updated their local ROW Ordinances.

The Coalition Cities have proactively updated their ordinances multiple times to respond to changes in technology. For example, the City of Bloomington updated its wireless ordinance provisions in 1996 to respond to a large increase in demand for antenna sites due to the sale of “PCS” spectrum. The revised provisions established low cost, quick turnaround administrative approvals for antenna co-locations on existing structures, which allowed quick initial build outs of multiple wireless networks. As demand for wireless service has increased, providers have

¹⁰ See Minn. Stat. § 237.163, subd. 6c. “For users subject to the franchising authority of a local government unit, to the extent those rights, duties, and obligations are addressed in the terms of an applicable franchise agreement, the terms of the franchise shall prevail over any conflicting provision in an ordinance.”

found it increasingly difficult to identify sites in those residential areas of Bloomington that are far from any co-location opportunities. In 2001, Bloomington again updated its ordinances to address this difficulty by establishing standards for wireless in the ROW (microcells, picocells and femtocells). These standards allow antenna attachments on poles in the right of way and allow ROW pole extensions of up to 15 feet in height to accommodate antennas. In 2008, Bloomington yet again updated standards to address the co-location of antennas within bell towers, steeples, spires and similar structures as an additional way to facilitate antenna placement in highly residential areas.

On April 20, 2010, the Chair of the Minnesota Senate Energy Utilities Technology and Communications Committee held a hearing to update the committee on the “state of telecommunications in Minnesota.” A panel of industry members testified to provide the committee with a Telecommunications Industry Overview for the State of Minnesota. A corporate representative of AT&T, Mr. Bob Bass, testified that AT&T had no problems or obstacles with wireless deployment in Minnesota.¹¹

¹¹ See link to minutes from this meeting and testimony.

http://www.senate.mn/media/media_list.php?ls=86&archive_year=2010&archive_month=04&category=committee&type=audio&ver=new#monthnav

Excerpt of actual testimony from Mr. Bass:

For the record I'm Bob Bass and I am the President of AT&T in Minnesota, and I've got the wireless piece of today's presentation. [history of wireless industry] [statistics of wireless usage] ... The barriers for entry to become a wireless provider are pretty low. Competitors can choose to go through resell agreements with major providers or they can file with the FCC to get a license to acquire their own spectrum. Obviously that requires money so raising capital would be the barrier the facility based wireless provider would face.

From a Minnesota perspective there are no regulatory requirements which stand as an impediment for someone to enter the business. Really the closest thing that is a stretch to come up with, a kind of an obstacle for wireless carriers would be, has been with local governments, and local governments still have the ability to assert their authority over approval of cell towers, whether it is through building permits, zoning, or access to rights of way. But let me emphasize that local governments in Minnesota, at least from AT&T's perspective, have always been very fair and very thorough and have processed those applications in a timely manner when we've had them. We've had some situations where we get some NIMBY activity (folks love wireless coverage but sometimes they don't like wireless cell sites) but that's really the extent of it. Emphasis added

While industry providers are likely to focus on a very small minority of cities nationwide as examples supporting Commission regulation of ROWs, the Commission should focus on the overwhelming majority of cities across the nation that exercise local regulatory ROW control in a reasonable and professional manner. In Minnesota, over 800 jurisdictions regulate local ROWs, each with unique local characteristics that require an understanding of the community and the development goals of the city. ROW disputes are generally resolved at the planning commission level or with input of elected officials that must answer to their constituents. If the local elected officials perform poorly in managing the ROW they will be voted out of office. The system has been working properly for decades and has resulted in a communications marketplace that is flourishing with wireline and wireless voice, video and broadband providers.

III. CONGRESS AND THE COMMISSION HAVE ALREADY PROVIDED FEDERAL REQUIREMENTS TO ASSIST MUNICIPALITIES IN REGULATING THE RIGHT OF WAY

In Minnesota, as in most states, a city's authority over the ROW begins with state law, although Section 253 of the Telecommunications Act of 1996¹² imposes a federal limitation that must be considered. The Telecommunications Act of 1996 established specific federal limits on the exercise of municipal authority over the ROW. Further regulation by the Commission is not needed at this time. Over the past 15 years, Section 253, *Removal of Barriers to Entry*, has been a key provision that cities have worked to comply with to withstand scrutiny from telecommunications providers. Section 253 provides, in part:

(a) In General.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements

¹² Communications Act, 47 U.S.C. § 253.

necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and Local Government Authority.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

In 2000-01 member cities of both the NDC4 and SWSCC processed applications from two different competitive wireline cable/broadband providers¹³ applying for cable franchises to overbuild new networks. The cities worked with the applicants and successfully negotiated unique franchises¹⁴ culminating in all of the cities approving a franchise ordinance for one of the companies. The franchise terms for construction, build-out, compensation, PEG and I-Net requirements were equivalent, but not identical, to those imposed upon the incumbent operator. Ultimately a negative turn in the economy and venture-capital-marketplace changes forced the company to reduce its expansion plans across the country and the system was never built in the Twin Cities region. However, this experience helped prepare both the NDC4 and SWSCC cities to welcome any new applicants into the area to provide more competition to our residents. The Coalition Cities hope to soon entertain an application from our local exchange carrier (CenturyLink - having recently acquired Qwest) and/or some of the potential CLEC or OVS operators that have reported to plan to provide video in our marketplace.

A. Section 253 (a) Establishes Parameters for Local ROW Regulation and Further Federal Regulation is Not Required.

Under Section 253 (a), federal law already allows telecommunications providers to challenge any local prohibition that has a practical effect of prohibiting the ability of any entity

¹³ The two competitive providers were Wide Open West and Everest Communications.

¹⁴ One company withdrew its application mid-process.

to provide any interstate or intrastate telecommunications service.¹⁵ If the telecommunications provider meets this burden, the state or local unit of government must then demonstrate that one of the safe harbor exceptions under Section 253, subsections (b) and (c) is triggered.¹⁶

Subsections (b) and (c) identify certain powers of state and local governments that are not affected by the restriction contained in subsection (a). The Commission has stated that:

*when a local government chooses to exercise its authority to manage the public rights-of-way it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.*¹⁷

If the ROW requirements violate section 253(a) and do not meet the criteria of sections 253(b) or (c), the provider may seek preemption. Federal courts have established a process for review under section 253. First, there is a determination of whether there is a violation of section 253(a). If so, then there is a determination whether the violation is permitted under sections 253(b) and/or (c).¹⁸ The Commission has also articulated several substantive criteria to provide guidance to municipalities regarding whether a legal requirement has the “effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” under

¹⁵ See generally, *In re California Payphone Ass’n, Opinion and Order*, 12 FCC Rcd. 14191 (1997), *In the Matter of The Public Utility Commission of Texas*, 13 F.C.C.R. 3460, and *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*, 11 FCC Rcd. 13082 (1996).

¹⁶ See *Id. Classic Telephone, Inc.*

¹⁷ *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. September 19, 1997). See also *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) (City was willing to apply a fee to all providers but state law prevented application).

¹⁸ *In the Matter of The Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 3480 (F.C.C. October 1, 1997), which provides:

Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of Section 253(a) standing alone. If we find that it violates Section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under Section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with Section 253(d).

section 253(a).¹⁹ For example, the Commission recognizes that section 253(a) bars legal requirements that materially: 1) increase the costs of some entities without necessity;²⁰ or 2) inhibit the ability of an entity to compete in a fair and balanced legal and regulatory environment.”²¹

The process, as established by Congress and the Commission, is functioning properly and is not in need of revision or modification. When considering a specific local ROW ordinance or other legal requirement, the burden is on the provider, or those seeking preemption, to demonstrate that the challenged ROW ordinance prohibits or has the effect of prohibiting a potential provider’s ability to provide an interstate or intrastate telecommunications service under section 253(a).²² Parties seeking preemption of a local ordinance must supply credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).²³ Since these telecommunications providers (cable and telecom operators) are the key providers of broadband services, Section 253 serves to protect such broadband providers from barriers to entry at the local level.

All of the broadband providers operating in the Coalition Cities are telecommunications providers and enjoy the protections afforded by Section 253. In fact, when considering revisions to a local ROW code, the Coalition Cities are guided by Section 253 to make sure that all users are permitted a right to place facilities in the ROW on fair and competitively neutral terms. The Commission and various courts have already provided cities with a list of issues appropriate for ROW regulation which include:

¹⁹ See *In the Matter of Classic Telephone, Inc.*, 11 F.C.C.R. 13082, 13094 (F.C.C. October 1, 1996); *In the Matter of New England Public Communications Council*, 11 F.C.C.R. 19713, 19720 (F.C.C. April 18, 1997).

²⁰ *In the Matter of The Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 3466 (F.C.C. October 1, 1997).

²¹ *In the Matter of California Payphone Association*, 12 F.C.C.R. 14191, 14206 (F.C.C. July 17, 1997).

²² *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, (F.C.C. September 17, 1997).

²³ *Id.*

- 1) Coordination of construction schedules.
- 2) Determination of insurance.
- 3) Indemnity requirements.
- 4) Establishment and enforcement of building codes.
- 5) Monitoring the various systems and utilities that use the rights-of-way to prevent interference between them.²⁴
- 6) Regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts.
- 7) Requiring a company to place facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.
- 8) Requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations.
- 9) Enforcing local zoning regulations.
- 10) Requiring a company to indemnify the city against any claims of injury arising from the company's excavation.²⁵

Federal courts have also provided clarification regarding what may not be included within a ROW ordinance. Generally, the courts have found that “right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way.”²⁶ With this principle in mind, courts have held that the following ROW ordinance provisions may not be unacceptable:

1. Regulations requiring the applicant to submit proof of its financial, technical and legal qualifications.²⁷
2. A description of the telecommunication services to be provided.²⁸
3. Regulation of stock transfers.²⁹
4. Most favored community status – best available rates and terms.³⁰
5. Unspecified franchise terms and ability to revoke a franchise based on unnamed factors.³¹

²⁴ See *Generally In the Matter of Classic Telephone, Inc.* for support of items 1-5.

²⁵ Id. The FCC quoted from the Congressional testimony of Senator Diane Feinstein, who offered examples of the types of restrictions that Congress intended to permit under Section 253(c) for support of items 6-10.

²⁶ *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1177 (9th Cir. 2001).

²⁷ See *Bell South Telecommunications v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1355 (S.D. Fla. 1999). See also *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998).

²⁸ See *Bell South Telecommunications v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999). (The city does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities.)

²⁹ See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1177 (9th Cir. 2001).

³⁰ See *TCG New York, Inc. v. White Plains*, 125 F. Supp. 2d 81, 93 (S.D. N.Y. 2000) (Holding that a most-favored clause is akin to regulation of rates, terms and conditions of service unrelated to the use of public rights-of-way). See also *In re TCI Cablevision*, 12 F.C.C.R. 21396 ¶ 105 (noting that most favored nation clauses are difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority.)

³¹ See *White Plains*, 125 F. Supp. 2d at 92; *City of Coral Springs*, 42 F. Supp. 2d at 1306.

Providers have not complained that the ROW requirements in the Coalition Cities are unduly burdensome or in any way prevent the deployment of broadband services. This remains true despite the fact that the Coalition Cities have fairly sophisticated ROW rules and regulations, permitting requirements, street restoration rules, insurance and indemnification obligations, and bond mandates. Nevertheless, broadband providers routinely construct and upgrade their facilities in the ROW of the Coalition Cities. Broadband deployment is not slowed by ROW regulations, but rather by the providers themselves due to capital limitations or internal policies that will only authorize construction in densely populated areas where the provider can quickly obtain a return on investment.

The Coalition Cities are not faulting the industry for making such business decisions or for limiting construction during an economic downturn, but any attempt to blame a lack of broadband deployment on ROW regulations is simply inaccurate and unsupportable.

B. Municipalities Are Entitled to Fair and Reasonable Right of Way Compensation.

The NOI raises the issue of ROW charges and inquires about reasonableness of ROW charges, permitting fees, and administrative cost. The Commission seeks information about market based rates, per-foot or percentage of revenue, identifiable cost, processing fees, recurring and non-recurring charges, and recovery of cost.³²

In Minnesota, municipalities may only impose fees to recover the “actual cost of managing the right of way”.³³ Minn. Stat Section 237.162, subd. 9, defines the cost of managing the rights-of-way in the following manner:

Management costs” or “rights-of-way management costs” means the actual costs a local government unit incurs in managing its public rights-of-way, and includes such costs, if incurred, as those associated with registering applicants; issuing, processing, and

³² NOI, ¶¶ 16-20, “Reasonableness of Charges” and ¶¶ 21-23 “Qualitative Information”.

³³ Minn. Rules pt. 7819.1000

verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user equipment during public right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits. Management costs do not include payment by a telecommunications right-of-way user for the use of the public right-of-way, the fees and cost of litigation relating to the interpretation of this section or section 237.163 or any ordinance enacted under those sections, or the local unit of government's fees and costs related to appeals taken pursuant to section 237.163, subdivision 5.

Permit fees under Minnesota law must be available to the public, and must be established in advance of a provider's application.³⁴ Thus, the Coalition Cities do not charge permit fees on a case-by-case basis (an exception exists for special mapping costs and wireless applications). Permit fees are based on an allocation among all users of the ROW, including the city itself. The permit fees also reflect the proportionate cost imposed by each type of use of the ROW. Overhead facilities, for example, may be subject to a lower permitting fee than underground facilities because the work associated with overhead facilities may not require the city to monitor the impact on the traveled surface of the ROW.³⁵

Despite these state law limitations that have been in place for over 12 years, the Coalition Cities support the right of municipalities to receive compensation, not limited to cost-based fees, for the use of rights-of-way.³⁶ In fact, several courts have found that "the term 'compensation' has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses. It is thus doubtful that Congress, by the use of the words 'fair and reasonable compensation,' limited local governments to recovering their reasonable costs."³⁷ This rationale is further supported by the Sixth Circuit Court of Appeals

³⁴ Minn. Rules pt. 7819.1000, subp. 1.

³⁵ Minn. Rules pt. 7819.1000, subp. 2.

³⁶ See *Bell Atlantic Maryland, Inc. v. Prince George's County, Maryland*, 212 F. 3d 863 (4th Cir. 2000).

³⁷ *Id.*

decision in *TCG Detroit v. City of Dearborn* which upheld a district court decision finding that a 4% franchise fee was permissible under Section 253(c).³⁸

The *Dearborn* decision supports the argument that cities are not limited to recovering only their “costs” but rather may impose reasonable “rent” or compensation for the use of rights-of-way. Furthermore, the *Dearborn* decision helps to clarify the requirements in Section 253(c) mandating “non-discriminatory” treatment. In the *Dearborn* case, Ameritech operated under a 100-year-old authorization that predated state franchising. TCG, a competitive access provider, argued that a 4% franchise fee was discriminatory because such fee was not also imposed upon Ameritech. The *Dearborn* district court identified four nonexclusive factors relevant to whether the fees exacted from TCG were appropriate. The four factors were: 1) the extent of use of public rights-of-way; 2) whether other carriers have agreed to comparable compensation (or comparable uses of public rights-of-way); 3) the course of dealings among the parties; and 4) whether the compensation sought is so excessive that it is likely to render doing business unprofitable.³⁹

While Minnesota cities are currently limited in the amount they collect for ROW use, this should NOT be a model for the nation. Rather, the Coalition Cities support all cities’ ability to collect the full market value of limited and valuable public resources being used by private companies in a for-profit business. Taxpayers should not be subsidizing this private industry (broadband providers) by making limited and valuable public assets available at less than market rates, any more than any other private industry, for example retail sales, would be entitled to

³⁸ See *TCG Detroit v. City of Dearborn*, 205 F. 3d 618 (6th Cir. 2000); (The district court’s decision can be found at 16 F. Supp. 2d 785 (E.D. Mich. 1998).

³⁹ *City of Dearborn*, 16 F. Supp. 2d at 790-91 See also *White Plains*, 125 F. Supp. 2d at 97 (citing *City of Dearborn*, 16 F. Supp. 2d at 790, *City of Coral Springs*, 42 F. Supp. 2d at 1309, *Town of Palm Beach*, 127 F. Supp. 2d at 1353).

build a retail store on a public park without paying market rate rent or purchase price for the land.

The Commission cannot establish nationwide rates for ROW occupation just as the federal government cannot establish a preset formula to dictate the market rates for commercial real estate from region to region and market to market. Within the Coalition Cities the market rates for real estate vary dramatically. It is simply not possible to set uniform ROW rates that would be acceptable for a fully paved busy retail district in Bloomington, adjacent to the Mall of America and the International Airport, and a historical preservation site along the river in Mendota, located just five miles away.

IV. RESPONSES TO SPECIFIC INQUIRIES RAISED IN THE NOI

A. What are the policy goals underlying the current ROW practices?

The City of Bloomington's policy goals include facilitating the provision of communications services to residents and businesses while minimizing adverse visual impacts. To the extent towers are required for the provision of services, Bloomington has the policy goal of avoiding potential damage to neighboring properties and maximizing the use of existing towers and structures to accommodate antennas to reduce the overall number of structures needed in the City.

B. Is information on all necessary application procedures, forms, substantive requirements, and charges readily accessible?"

The majority of the Coalition Cities provide these materials online. Over time, the Coalition Cities have noticed that telecommunication zoning applications are being submitted less often by experienced local specialists who are familiar with local codes and procedures and more often by less experienced out of state representatives. While providers likely perceive this change as a cost saver, this practice is penny-wise and pound-foolish as it increases the

likelihood for incomplete applications and slows the overall time to market for telecommunication facilities. Failure of these providers to familiarize themselves with local policies and ROW requirements has greatly increased the municipal staff time necessary to guide an applicant through a routine approval process. While it is certainly easy for the provider to blame the cities for these slow downs, other providers that have taken the time to follow the requirements have found no difficulty obtaining a timely decision on submitted applications.

C. Are there types of errors, omissions, or substantive requirements that frequently lead to rejection, dismissal, or return of applications?”

One example from the City of Bloomington relates to the execution of zoning applications. Bloomington requires zoning applications to be signed by a representative of the underlying property owner. It is not uncommon for providers to submit applications without the required authorization, in which case the application is returned as incomplete. Providers that take the time to follow the simple instruction have no issues and fully understand the purpose of the requirement, those that do not may argue that the City is delaying their application.

D. Is it possible to identify wireless facilities siting charges that all stakeholders agree are reasonable?

It is impossible to standardize wireless facility siting charges in a manner that all stakeholders would agree is reasonable. In regards to lease rates for wireless facilities, each jurisdiction will set their rates based on factors that may vary widely from jurisdiction to jurisdiction. These factors may include but are not limited to staff costs for reviewing proposals and negotiating leases, staff costs for coordinating and monitoring construction, staff costs for ongoing lease administration, the risk of construction negatively impacting other utilities or improvements, added costs for relocation upon redevelopment, added intrusion of ongoing provider site visits and access requests for periodic maintenance and frequent upgrades, potential added removal costs for provider abandonment of the facility, lost value of the land for public

purposes, and assessments of regional lease rates as set by the market. These factors vary considerably from site to site and from region to region.

Similarly, it would be impossible to standardize application fees for wireless facility siting in a manner that all stakeholders would agree are reasonable. Application fees are needed to offset staff costs and consulting fees (technical reviews and interference studies) generated in processing and reviewing applications. Staff costs vary significantly from city to city and region to region.

E. We request information on the policy goals and other objectives underlying practices and charges related to approval of wireless facilities.

The Coalition Cities view the leasing of wireless antenna and ground equipment space at public facilities such as water towers, ball-field light poles and siren poles to advance policy goals of providing quality telecommunication services throughout the city while minimizing the negative impact on surrounding residents. Attachment rates for municipally owned facilities are set based on an analysis of regional market-based lease rates. The Coalition Cities also evaluate staff time costs, risks, encumbrances and impacts to facilities and may turn away offers that do not fully compensate the municipality for those costs. If the Commission were to attempt to standardize lease rates and jurisdictions believed their costs and risks were not being covered by those standardized rates, those jurisdictions would elect not to lease their facilities. This would have the impact of reducing the sites and facilities available to the industry and would force the consideration of new construction that would place an added burden on the community and its residents.

F. We also ask interested parties to identify any other practices or approaches that have been particularly beneficial to facilitating broadband deployment.

The City of Bloomington has employed the following practices, which have been particularly beneficial to facilitating broadband deployment:

1. Allowing towers and antennas broadly throughout the city;
2. Allowing sufficient tower height;
3. Rapid turnaround administrative approvals for antenna co-locations on existing towers, buildings and other structures;
4. Coordinating all applicant communications and application review through one staff person well versed in the technology and applicable City standards;
5. Allowing antennas in the public right of way via pole attachments and pole extensions;
6. Allowing roof and wall mounted antennas, including on multi-family residential buildings;
7. Allowing antennas at places of assembly camouflaged within bell towers, steeples, spires and similar structures; and
8. Leasing City owned facilities for antenna co-locations including water towers and reservoirs, public safety towers, ball-field light poles, siren poles and poles in the right of way.

G. Should the Commission compile a set of best practices for public rights of way and wireless facilities siting policies that are consistent with facilitating broadband deployment? If so, how should this be done? Should this effort focus on a limited set of problematic issues, or should we instead try to develop a comprehensive set of best practices?

A comprehensive compilation of best practices would be helpful to jurisdictions as they wrestle with how to best approach and regulate public ROWs and wireless facilities. In the NBP last year, the FCC itself recommended the establishment of a joint of task force with state, Tribal and local policymakers to craft guidelines for rates, terms, and conditions for access to public ROWs.⁴⁰ It is time for the FCC to act on its recommendation by promptly appointing that local task force. This would then result in a set of “best practices” that can be located in a common forum to be shared with all municipalities in the nation.

V. CONCLUSION

The Coalition Cities recognize the benefits of broadband deployment in their communities. The Commission’s NOI incorrectly assumes that municipalities are standing in the way of broadband deployment and are serving as “barriers to entry.” In fact, as these comments

⁴⁰ NBP. Recommendation 6.6. *See* NBP, Chap. 6, at 113.

have demonstrated, the exact opposite is true. Municipalities have actively promoted broadband deployment in Minnesota and have encouraged providers to offer citywide services rather than simply cherry pick the most attractive portions of a community.

To protect the health and safety of businesses and residents, as well as to protect the existing facilities of local government and other ROW users, municipalities must have the ability and local authority to ensure the efficient use of the ROW. This can best be accomplished through the development of effective “local policies and management practices” and the ability of municipalities to levy fees to recover costs and receive fair and reasonable compensation from ROW occupants for the private for-profit use of these public municipal ROWs.

The Coalition Cities welcome the opportunity to submit these comments and look forward to further dialogue with the Commission.

Respectfully submitted,

CITY OF BLOOMINGTON, MINNESOTA



By: _____

By: _____

Gene Winstead
Mayor of Bloomington, Minnesota

SOUTHWEST SUBURBAN CABLE COMMISSION



By: _____

Jim A. Genellie, Secretary/treasurer SWSCC

**NORTHERN DAKOTA COUNTY CABLE
COMMUNICATIONS COMMISSION**



By: _____
Jodie Miller, Executive Director

Dated: July 15, 2011